Supreme Court, U. S.
FILED
OCT 22 1975
MICHAEL RODAK, JR., CLERK

No. 74-1055

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1975

W. T. STONE, WARDEN, PETITIONER

v.

LLOYD CHARLES POWELL, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

John J. Cleary
Federal Defenders of San Diego, Inc.
925 First Avenue, Suite 260
San Diego, California 92101
Attorneys for Amicus Curiae
(714) 234-8467

No. 74-1055

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1975

W. T. STONE, WARDEN, PETITIONER

v.

LLOYD CHARLES POWELL, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

John J. Cleary
Federal Defenders of San Diego, Inc.
925 First Avenue, Suite 260
San Diego, California 92101
Attorneys for Amicus Curiae
(714) 234-8467

INDEX

Page

Statement of Interest of Amici Curiae..... 1

Summary of Argument 2

Argument:

I. The principle of stare decisis, even in the flexible approach to constitutional questions, should be honored in the retention of the exclusionary rule on federal habeas corpus 5

II. The several purposes of the fourth amendment exclusionary rule require its continued availability to state prisoners seeking federal habeas corpus relief..... 9

A. The exclusionary rule implements the Fourth Amendment

B. The exclusionary rule insulates the judiciary from participation in violation of the Fourth Amendment.. 12

C. The exclusionary rule protects the rights of privacy of citizens generally..... 13

D. The exclusionary rule is designed to deter present and future violations of the Fourth Amendment..... 13

E. The exclusionary rule is designed to insure public confidence that government officials do obey the commands of the Fourth Amendment..... 14

Page

III. The stop and arrest of respondent on the authority of an unconstitutional vagrancy ordinance was in violation of the Fourth Amendment and the effects seized at that time must be suppressed..... 18

Conclusion..... 21

CITATIONS

Cases:

	Page
Adams v. New York, 192 U.S. 585 (1904) ..	5
Beck v. Ohio, 379 U.S. 89 (1964).....	18
Cardwell v. Lewis, 417 U.S. 583 (1974) ...	3, 6, 13
Elkins v. United States, 364 U.S. 206, 222 (1960)	6, 12, 14
Henry v. Mississippi, 379 U.S. 443 (1965) .	6
Katz v. United States, 389 U.S. 347 (1967) .	13
Kaufman v. United States, 394 U.S. 217 (1969)	6
Lefkowitz v. Newsome, 420 U.S. 283 (1975)	3, 7
Mancusi v. DeForte, 392 U.S. 364 (1968) ..	6
Mapp v. Ohio, 367 U.S. 643 (1961)	6, 11, 12, 13, 15
Moragne v. States Marine Lines, 398 U.S. 375 (1970)	5
Olmstead v. United States, 277 U.S. 438 (1928)	11, 15
Papachistou v. City of Jacksonville, 405 U.S. 156 (1972)	18
Powell v. Stone, 507 F.2d 93 (9th Cir. 1974)	7, 9, 18
Ross v. Moffitt, 417 U.S. 600 (1974)	1
Schneckloth v. Bustamonte, 412 U.S. 218 (1973)	3, 6, 7, 8
United States v. Brignoni-Ponce, 95 S. Ct. 2574 (30 June 1975)	18
United States v. Calandra, 414 U.S. 338 (1974)	15, 16
United States v. Maine, 420 U.S. 515 (1975)	5
United States v. Peltier, 95 S. Ct. 2313, 2317 (25 June 1975)	12, 14, 19
Weeks v. United States, 232 U.S. 383 (1914)	3, 5, 9, 10, 12, 13, 14
Whitely v. Warden, 401 U.S. 560 (1971) ...	6
Wolf v. Colorado, 338 U.S. 25 (1949).....	1, 6

Constitution and Statutes: Page

United States Constitution:

Fourth Amendment..... 1, 2, 3, 4, 6, 7, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20

Fifth Amendment..... 19

Fourteenth Amendment..... 6, 11, 19

18 U.S.C. § 3006A(g)..... 2

28 U.S.C. § 2254..... 2, 3

Miscellaneous:

1972-1975 The U.S. Courts: A Pictoral Summary 1975 2

No. 74-1055

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1975

W.T. STONE, WARDEN, PETITIONER,

v.

LLOYD CHARLES POWELL, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE CALIFORNIA PUBLIC DEFENDERS ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF THE RESPONDENT

INTEREST OF AMICUS CURIAE

The California Public Defenders Association is a non-profit corporation incorporated under the laws of the State of California in 1969. The purpose of the association is to assist organized defender offices in California, whether state or federal, in their ongoing efforts to provide effective representation for indigent criminal defendants. The Association represents approximately 600 defender attorneys and 34 defender offices in the State of California.

The suggestion of petitioner that state prisoners be prohibited from asserting Fourth Amendment violations in a federal habeas corpus petition would drastically affect the administration of criminal justice that would not only detract from the function of the Great Writ but would mark the resurrection of the illogical and unfair dichotomy of acknowledging the exclusionary rule only in federal cases. Cf. Wolf v. Colorado, 338 U.S. 25 (1949). State prisoners have a theoretical right to petition for redress (petition for writ of certiorari) for a violation of the Fourth Amendment in this Federal Court, but such chance of review is rare. The only meaningful opportunity is in the lower federal courts by a petition for writ of habeas corpus. The federal courts should remain open to state as well as federal defendants to enforce the Fourth Amendment of the Constitution of the United States.

The California Public Defender Association, in its goal to improve the availability of legal services for those charged or convicted of crime who because of their lack of finances would not be able to employ counsel are especially sensitive to the obstacles now before the indigent California prisoner who attempts to secure relief in the federal courts. This Court has advised in Ross v. Moffitt, 417 U.S. 600 (1974), that the convicted are not entitled to counsel on a petition for a writ of certiorari issued by this Court, and thus the prisoner

in seeking relief for a Fourth Amendment exclusionary rule claim in this Court will be substantially handicapped. [1] The state prisoner, ordinarily without funds for counsel, must fend for himself in the local federal courts in seeking post-conviction relief. He will be furnished standard district court forms for his 28 U.S.C. 2254 petition, with which he must present his claims. Most often the petition is denied after filing without requiring a response from the state agency. Only rarely is a hearing granted, and the appointment of counsel is discretionary with the district court. 18 U.S.C. 3006A(g). Although there are approximately 8000 state prisoner habeas corpus petitions filed each year (1972-1975, The U.S. Courts: A Pictorial Summary 1975, p. 5), very few require significant review and far less any litigation. The number of filings creates a distorted image of the actual processing of a habeas corpus petition at the lower federal court levels. The proposed exclusion of Fourth Amendment claims from this historically flexible remedy is both unwarranted and unnecessary. The state prisoner will be denied an important avenue to assert his federal claim, and the restriction of the exclusionary rule would have little effect on the number of such prisoner petitions filed. The erosion of the exclusionary rule is not consistent with fair implementation of the Fourth Amendment, and those suffering substantial imprisonment (those state prisoners serving short terms are not interested in pursuing such remedies, and although the Court has relaxed the requirements of "custody," experience still indicates that such petitions are filed by those serving long term confinement) should be allowed meaningful access to the federal courts in the assertion of claims arising from an unlawful search and seizure.

This brief is filed in support of the respondent.

1

Recent California legislation (S.B. 1018) was recently signed into law creating a State Public Defender who will be authorized to file petitions for writs of certiorari to this Court, but this office will not function until 1 July 1976.

SUMMARY OF ARGUMENT

So long as the principle of stare decisis is to remain the judicial theme by which the individual citizen is to order his affairs predictably against unpropitious surprise and the means by which the judiciary fosters the maintenance of public confidence in impersonal and reasoned judgments, the basic principles of judicial decision making mandate against the constant review by this Court of a repeatedly decided question. Whether Fourth Amendment exclusionary claims are available to the state prisoner under 28 U.S.C. 2254 is a question which this Court has confronted in this and each of the two preceeding years and in each case has entertained and decided the availability of the exclusionary claim of the petitioning state prisoner in the context of Fourth Amendment issues. Lefkowitz v. Newsome, 420 U.S. 283 (1975); Cardwell v. Lewis, 417 U.S. 483 (1974); Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Such recent resolutions of this question should be respected in light of purposes to be advanced by stare decisis.

Additionally, several purposes of the Fourth Amendment exclusionary rule require that state prisoners be provided its continued accessibility in federal habeas corpus relief. Since this Court's decision in Weeks, different purposes of the exclusionary rule have been advanced to support various specific conclusions as to its justification. The rule serves to implement the Fourth Amendment and thereby makes its commands self-executing. It also insulates the judiciary from involvement in Fourth Amendment violations as well as protects the rights of privacy of citizens generally. Moreover, in fulfilling these purposes, together with the purpose of deterrence, the rule is designed to foster the confidence of the public that their government officials will obey the commands of the Fourth Amendment. Clearly, much more than deterrence alone should be considered in any new application of the exclusionary rule. It follows, a fortiori, that each purpose of the rule should be reviewed when the question confronting this Court requests for its

resolution a possible foreclosing a long accepted application of the rule.

Finally, even if deterrence stood alone as the one reason for exclusion, the rule should still be sustained in its fullest application in the present context of the availability of federal habeas corpus relief to the state prisoner. There must exist an accountability on behalf of both law enforcement and legislatures to the demands of the Fourth Amendment. The argument of the petitioner that neither of these two arms of the government is to be deterred and, therefore, the exclusionary rule is not to be applied where an arrest and search made pursuant to a yet unchallenged vagrancy ordinance results in the seizure of evidence, is to say that a legislative body is free to establish an unconstitutional standard for arrest which until challenged will act as a shield to law enforcement violations of the Fourth Amendment. The ruling of this Court can and should deter such practice. This Court should not permit such an affront to the law as an unconstitutional vagrancy ordinance to stand, even for a moment, as an exception to the dictates of the Fourth Amendment.

I.

THE PRINCIPLE OF STARE DECISIS, EVEN IN THE FLEXIBLE APPROACH TO CONSTITUTIONAL QUESTIONS, SHOULD BE HONORED IN THE RETENTION OF THE EXCLUSIONARY RULE ON FEDERAL HABEAS CORPUS.

Constitutional questions are always open to re-examination, but the principle of stare decisis remains a powerful force in our jurisprudence. United States v. Maine, 420 U.S. 515, 527 (1975). The reasoning underlying this principle was explained in Moragne v. States Marine Lines, 398 U.S. 375, 403 (1970):

> "Very weighty considerations underlie the principle that courts should not lightly overrule past decisions. Among these are the desirability that the law furnish a clear guide for the conduct of individuals, to enable them to plan their affairs with assurance against untoward surprise; the importance of furthering fair and expeditious adjudication by eliminating the need to relitigate every relevant proposition in every case; and the necessity of maintaining public faith in the judiciary as a source of impersonal and reasoned judgments. The reasons for rejecting any established rule must always be weighed against these factors."

In 1904 this Court refused to adopt the exclusionary rule for illegally seized evidence in state criminal proceedings. Adams v. New York, 192 U.S. 585 (1904). Ten years later, however, this Court fashioned the exclusionary rule to implement the Fourth Amendment in federal criminal proceedings. Weeks v. United States, 232 U.S. 383 (1914). Thereafter a steady but obvious development resulted in the

Fourth Amendment, but not the exclusionary rule, being applied to the States through the conduit of the Fourteenth Amendment Due Process Clause. Wolf v. Colorado, 338 U.S. 25 (1949). The chronological development led to the removal of restrictions on the exclusionary rule such as the "silver platter doctrine" which was eliminated by Elkins v. United States, 364 U.S. 206 (1960).

In 1961, this Court announced that the exclusionary rule would apply to state criminal proceedings. Mapp v. Ohio, 367 U.S. 643 (1961). In 1965, the Court indicated that the remedy of federal habeas corpus was available to a state prisoner to assert the exclusionary rule announced in Mapp. Henry v. Mississippi, 379 U.S. 443, 452-453 (1965). Thereafter lower federal courts and this Court granted such relief to state prisoners through this procedural mechanism. Cf. Whitely v. Warden, 401 U.S. 560 (1971); Mancusi v. DeForte, 392 U.S. 364 (1968). In 1969 the collateral attack for an unlawful search and seizure available to the state prisoner was extended to the federal prisoner. Kaufman v. United States, 394 U.S. 217 (1969). These cases, especially since 1961, firmly establish the availability of the exclusionary rule to state prisoners both in direct and federal collateral attack on their convictions.

The continued use of the federal habeas corpus remedy was seriously challenged by the concurring opinion of Mr. Justice Powell in Schneckloth v. Bustamonte, 412 U.S. 218 at 250 (1973). In that concurring opinion, which was joined by the Chief Justice and Mr. Justice Rehnquist, Mr. Justice Powell stated that the Mapp exclusionary rule was not applicable in a federal habeas proceeding. Mr. Justice Blackmun agreed with nearly all of that which Mr. Justice Powell had to say, but refrained from joining because the case did not present a situation requiring that Kaufman v. United States, 394 U.S. 217 (1969) be overruled. 412 U.S. 218, 249. The issue was not met in Schneckloth because this Court resolved the case against the state prisoner. In Cardwell v. Lewis, 417 U.S. 583 (1974), the view espoused by Mr. Justice Powell directly contributed

to the disposition of the case. The plurality opinion of Mr. Justice Blackmun, joined in by the Chief Justice and Justices White and Rehnquist, held that the state prisoner, Arthur Ben Lewis, had not been the victim of an unlawful search where the police towed the defendant's car to a police impoundment lot and there took paint scrapings from the exterior of the car and observed the tire tread. The four dissenting Justices stated there had been an impermissible search without a warrant. Mr. Justice Powell cast the critical vote but did not adopt the plurality upholding the warrantless search but instead relied upon his concurrent opinion in Schneckloth v. Bustamonte in which he had suggested that federal habeas corpus review of a state criminal conviction be narrowed so as to remove Fourth Amendment claims based upon the exclusionary rule. 417 U.S. 483, 596.

The issue again has recently been resolved by this Court's opinion in Lefkowitz v. Newsome, 420 U.S. 283 (1975), [2] for in this case this Court recognized the right of a state prisoner to assert a search and seizure question by way of federal habeas corpus after a plea of guilty.

---

2 In Lefkowitz the defendant had been arrested for loitering and a search at the time of his arrest revealed narcotics. Pending the federal petition, the New York Court of Appeals held the loitering statute unconstitutional, and the federal courts agreed holding that the arrest and search were improper. This Court had limited its review to the assertion of a constitutional violation after a plea of guilty in the state court, and it would appear that the fact situation would not be controlling precedent. It should be noted, however, that the Second Circuit's opinion was relied upon by the Ninth Circuit in its decision in the present case. See Powell v. Stone, 507 F.2d 93, at 96 (9th Cir. 1974).

Implicit in this holding is the recognition of a state prisoner to assert the exclusionary rule on a federal habeas corpus claim. Mr. Justice Powell, joined by the Chief Justice and Mr. Justice Rehnquist, dissented based upon his concurring opinion in Schneckloth v. Bustamonte, 420 U.S. 283, 302. Mr. Justice White dissented on another ground that the plea of guilty foreclosed review. 420 U.S. 283, 294.

The recent resolution of this important question should be respected. The alternative would be chaos, in which the same question, although decided on a five to four basis, would be re-litigated each term. Basic principles of judicial decision making mandate against constant review.

II.

THE SEVERAL PURPOSES OF THE FOURTH AMENDMENT EXCLUSIONARY RULE REQUIRE ITS CONTINUED AVAILABILITY TO STATE PRISONERS SEEKING FEDERAL HABEAS CORPUS RELIEF

The Court of Appeals found two purposes to support its justification of the exclusionary rule: (1) deterrence of unconstitutional conduct by state officials and (2) "the imperative of judicial integrity"--courts should not be a party to the lawless invasions of constitutional rights. 507 F. 2d 93, 98. The petitioner lists three purposes of the rule: the two cited by the Court of Appeals and the right of privacy. (Brief for Pet. 25-26). The petitioner then contends that the right of privacy and the imperative of judicial integrity are not valid purposes for the rule and criticizes the deterrence effect on legislative bodies.

Since the creation of the exclusionary rule different purposes have been recognized for its justification. The selection of a particular purpose will tend to justify or support a specific conclusion. The decision making process should involve all the several purposes for the rule. When the rule is limited to the deterrence purpose alone, as suggested by the petitioner, much of the reasoning and precedent will be unfairly neglected. The Court should re-evaluate the use of the rule in light of its several purposes.

The purposes attributed by this Court for the Fourth Amendment exclusionary rule are:

A. The Exclusionary Rule Implements the Fourth Amendment.

In Weeks v. United States, 232 U. S. 383 (1914), this Court stated:

> "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution." 232 U. S. 383, 393.

The Court went on further to state:

> "The effect of the 4th Amendment is to put the courts of the United States and Federal officials in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all intrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and

to which people of all conditions have a right to appeal for the maintenance of such fundamental rights." 232 U. S. 383, 391-392.

The early statements of purpose rely heavily on theoretical considerations in the effective enforcement of the Fourth Amendment. There is no balancing or weighing process, which is a later concession to the pragmatic demands of efficient law enforcement (other than the Constitutional requirements).

Chief Justice Taft in Olmstead v. United States, 277 U. S. 438, 442 (1928), stated:

> "The striking outcome of the Weeks case and those which followed it was the sweeping declaration that the Fourth Amendment, although not referring to or limiting the use of evidence in court, really forbade its introduction, if obtained by government officers through a violation of the amendment."

In Mapp v. Ohio, 367 U. S. 643 (1961), which outlines the history and development of the rule, the Court echoed the continuing sentiment that the Fourth Amendment was self-executing:

> "Since the Fourth Amendment's right of privacy has been declared enforceable against the States through the Due Process Clause of the Fourteenth, it is enforceable against them by the same sanction of exclusion as is used against the Federal Government. Were it otherwise, then just as without the Weeks rule the assurance against unreasonable federal searches and seizures would be "a form of words", valueless and undeserving of mention in a perpetual charter

> of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in 'the concept of ordered liberty.'" 367 U. S. 643, 655.

If the Fourth Amendment is to have effective meaning, then evidence adduced in its violation must be excluded from federal and state trials.

B. The Exclusionary Rule Insulates the Judiciary from participation in Violation of the Fourth Amendment.

In Weeks, the U. S. Marshal, an officer of the court, improperly secured evidence by an unlawful search and seizure, and the Court held the evidence inadmissible. The Court held:

> "To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." 232 U. S. 383, 894.

This same purpose was acknowledged in Mapp v. Ohio, 367 U. S. 643, 648-649, 659-660 (1961), and United States v. Peltier, 95 S. Ct. 2313, 2317 (25 June 1975), but the phrase, "the imperative of judicial integrity" was fashioned in Elkins v. United States, 364 U. S. 206, 222(1960).

Although exceptions have been made to the exclusionary rule, one of the primary purposes was to

announce that sub silentio the judiciary would not approve illegal searches. If only words of condemnation were used, the judiciary could not escape criticism that, in truth and in fact, it approved of the unlawful seizure of the evidence. The exclusionary rule is affirmative proof that the judiciary respects Fourth Amendment rights.

C. The Exclusionary Rule Protects the Rights of Privacy of Citizens Generally.

In Mapp, this Court recognized "the exclusion doctrine (as) an essential part of the right of privacy." 367 U.S. 643, 656. In Katz v. United States, 389 U.S. 347 (1967), the Court reasoned that "the Fourth Amendment protects people, not places" (389 U.S. 347, 351) and noted that the Fourth Amendment protects individual privacy against certain kinds of governmental intrusion. 389 U.S. 347, 350. In the plurality opinion of Justice Blackmun in Cardwell v. Lewis, 417 U.S. 583 (1974), he stated:

> "Rather than property rights, the primary object of the Fourth Amendment was determined to be the protection of privacy. Id., at 305-306. And it had been said earlier, 'The decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy.'" 417 U.S. 583, 589.

D. The Exclusionary Rule is designed to deter present and future Violations of the Fourth Amendment.

Contrary to the opinion of those bent on restricting or eliminating the exclusionary rule, deterrence is not the only purpose of exclusion. As one of several purposes, it was recognized early in Weeks:

> "[T]his court said that the 4th Amendment was intended to secure the citizen in person and property against unlawful invasion of the sanctity of his home by officers of the law, acting under legislative or judicial sanction. This protection is equally extended to the action of the government and officers of the law acting under it." 232 U.S. 383, 394. (Emphasis added).

The peitioner's argument is that deterrence is directed only against law enforcement officers. (Brief of Pet. pp. 35-37), but this interpretation is unduly restrictive and fails to consider the established precedent of this Court. The exclusionary rule not only deters the individual officer but also government itself (i.e. legislature or city council). The most frequently cited quote as to this purpose of the rule is in Elkins v. United States, 364 U.S. 206, 217 (1960):

> "Its purpose is to deter - to compel respect for the constitutional guaranty in the only effectively available way - by removing the incentive to disregard it."

In United States v. Peltier, 95 S. Ct. 2313, 2317 (25 June 1975), the Court in context of the retroactive application of a decision outlawing certain immigration searches placed reliance upon the deterrance purpose.

E. The Exclusionary Rule is designed to insure Public Confidence that Government Officials do obey the Commands of the Fourth Amendment.

This purpose of the exclusionary rule, although implicit in the holding in Weeks, was probably first expressly formulated in the well-known quote of Mr. Justice Brandeis in his dissenting opinion in

Olmstead v. United States, 277 U. S. 438, 485 (1928):

> "In a government of laws existence of the government will be imperilled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means -- to declare that the Government may commit crimes in order to secure the conviction of a private criminal -- would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face."

The substance of this quote was cited in Mapp v. Ohio, 367 U. S. 643, 659 (1961). In light of recent violations of the Fourth Amendment by officials at the highest level of government which involved the public with greater cynism about government, the comments of Justice Brennan express a purpose needed in contemporary society:

> "The exclusionary rule, if not perfect, accomplished the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people -- all potential victims of unlawful government conduct -- that the government would not profit from its lawless behavior, thus minimizing the risk of seriously

> undermining popular trust in government. United States v. Calandra, 414 U. S. 338, 357 (1974) (Dissenting opinion).

In the evaluation and application of the exclusionary rule, each purpose should be reviewed. More than deterrence is involved. Even if focus was limited to deterrence, then this Court should sustain its present use on federal habeas corpus review as a necessary compliment to existing state review. Without habeas corpus review, federal review is meaningless, [3] and state courts, in response to pressure from local law enforcement activities and aware of the lack of federal review, establish any standard for Fourth Amendment claims. It is one thing to cut new ground with the exclusionary rule, but it is quite another to foreclose review that has been available for several years.

---

3 The review capability of this Court is limited, and in recent years this Court has been more inclined to grant certiorari petitions seeking to limit the protection afforded under the Fourth Amendment by a lower federal or state court.

Such retrogression is inconsistent with the declared purposes of the rule. [4]

---

[4] Although the efficacy of the exclusionary rule has not been formally established by empirical data, those involved in the day-to-day operation of the criminal justice system are only too aware of the illusory value of other alternatives. Criminal and civil court actions and administrative proceedings against law enforcement have been ineffective in deterring Fourth Amendment violations The one often neglected advantage of the exclusionary rule is that it avoids proliferation of litigation. Those who suggest and favor the separate civil suit to enforce the Fourth Amendment must not be aware of the burdening caseload of the courts or know, in fact, that such a civil suit is an illusory remedy.

III.

THE STOP AND ARREST OF RESPONDENT ON THE AUTHORITY OF AN UNCONSTITUTIONAL VAGRANCY ORDINANCE WAS IN VIOLATION OF THE FOURTH AMENDMENT AND THE EFFECTS SEIZED AT THAT TIME MUST BE SUPPRESSED.

This Court in granting certiorari asked that an additional question be briefed. That question posited that the district court had found probable cause to arrest the respondent for a previously unchallenged vagrancy ordinance. Although the district court found probable cause from the ambiguous actions and responses of the respondent to justify his arrest under the vagrancy ordinance (Pet. for Certiorari, App. B, pp. xvii-xix), the Court of Appeals found that this particular vagrancy ordinance subverted the requirement for probable cause in two ways: (1) it authorized arrest on suspicion and (2) there were no reasonable criteria by which to detect a violation. 507 F.2d 93, 96-97.

Vagrancy laws are sui generis, because their primary purpose is to justify police control and removal of undesirable persons. The offense itself is of doubtful social utility in protecting the public, but the police control is rationalized in what misconduct it might anticipate. It is most difficult to accept the petitioner's argument that relief may be obtained by attacking the ordinance (Brief of Pet. p. 36), for the respondent seeks redress from the search, not the defective ordinance. The ordinance, by its vicarious use in this case, was a means to justify police action rather than to right a substantive wrong. This vagrancy ordinance was an open license to arrest on suspicion, which this Court has clearly rejected. Papachristou v. City of Jacksonville, 405 U.S. 156 (1972). An arrest, which occurred here, must be based on probable cause. Beck v. Ohio, 379 U.S. 89 (1969). The facts, even in context of the ordinance, did not rise to the level of probable cause. More importantly, the facts giving rise to the stop and questioning did not amount to a reasonable suspicion so that any information derived from the stop and questioning would be inadmissible. United States v. Brignoni-Ponce, 95 S. Ct. 2574(30 Jun 75)

Without the vagrancy ordinance there could be no lawful stop and arrest. With the vagrancy ordinance, even if patently unconstitutional, the petitioner seeks to justify the arrest. The petitioner relies upon the recent decision in United States v. Peltier, 95 S. Ct. 2313 (25 June 1975). Such reliance is misplaced. An open-ended vagrancy ordinance cannot be compared with statutory and implementing administrative regulations controlling the immigration of aliens. The statutes relied upon by the immigration officials had been judicially approved by the lower federal courts for a number of years. If the petitioner's argument is extended to its logical conclusion, there could be no application of the exclusionary rule because every case rules on a search conducted in the past.

Simply stated, may the legislative body establish a standard which, until challenged operate as a shield for patent violations of the Fourth Amendment? For example, if the City of Henderson, Nevada, passed an ordinance that no yellow-skinned persons could remain in that town after sundown, would the arrest and search of such a person after sundown be permissible? [5] This ordinance would violate the Fourteenth and Fifth Amendments, and if it permitted the arrest of the person, then it would violate the Fourth Amendment protection against unlawful seizure of that person. The danger of "bootstrapping" is obvious when the police officer may justify any arrest by reliance on any ordinance. The argument of petitioner is that neither the police officer nor the legislature will be deterred, therefore, the exclusionary rule need not be applied. But both the individual officer and the legislative body are required to respect the demands of the Fourth Amendment. There must be accountability. In this case, the ordinance was not a law nor gave the appearance of a

---

5 This hypothetical ordinance has greater clarity than the defective vagrancy ordinance.

constitutionally authorized law but rather was an affront to the law. It would be a strange irony to use this particular ordinance as a shield to the Fourth Amendment.

CONCLUSION

For the foregoing reasons, as well as those contained in respondent's brief, the California Public Defender Association, as amicus curiae requests that this Court affirm the judgment of the Court of Appeals.

Respectfully submitted,

JOHN J. CLEARY
Federal Defenders of San Diego, Inc.
925 First Avenue, Suite 260
San Diego, California 92101
Attorney for Amicus Curiae
(714) 234-8467

SINCE 1956
THE BRIEF SHOP
10844 VENTURA BOULEVARD
NORTH HOLLYWOOD, CA. 91604
LAWYERS BRIEF SERVICE
LEGAL & COMM. PRINTING
(213) 877-8620 763-2965

Produced By Copy-Print Method

see

74

1222